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IN THE

Supreme Court of the United States

October Term, 1958.

No. 172

EUGENE DUPREE,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No.

EUGENE DUPREE,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which on new grounds, affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania, which dismissed petitioner's complaint on a Motion for Summary Judgment.

OPINIONS BELOW.

A copy of the Opinion of the United States Court of Appeals for the Third Circuit is attached at pages 9a-15a, also a minor amendment to that Opinion, 17a, a Per Curiam Opinion denying rehearing, 21a, and a dissent by Chief Judge Biggs, 21a-22a. The Opinion of the United States District Court is attached at 6a-8a. None of the above Opinions have been reported.[1]

1. Petitioner's prior litigation arising from the same facts is reported in *Dupree v. U. S.*, 247 F. 2d 819; and 146 F. Supp. 148. Attached hereto are those Opinions and the pleadings in that prior litigation 24a-41a.

JURISDICTION.

The final order of the United States Court of Appeals for the Third Circuit was entered May 8, 1959. 23a. The time for filing this petition for writ of certiorari will expire July 8, 1959.

The jurisdiction of the Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. 1254(1)).

STATUTORY PROVISIONS INVOLVED.

This petition is concerned with the Federal Tort Claims Act, 28 U. S. C. 1346(b), 2671, 2674, 2680(h), and particularly with the exception to that Act for an "interference with contract rights". The sub-section containing that exception provides: "The provisions of this chapter (Tort Claims Act) and section 1346(b) of this title shall not apply to—(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or *interference with contract rights.*" (Emphasis supplied.) 28 U. S. C. 2680(h).

STATEMENT OF THE CASE.

Petitioner, a licensed ship's captain, commenced this action in the U. S. District Court for the Eastern District of Pennsylvania.

In this action petitioner alleged that the United States District Court had jurisdiction to award him damages for his injury by the negligent conduct of the U. S. Coast Guard. The Coast Guard's alleged negligent conduct was its intentional and unjustifiable withholding of petitioner's security clearance.[2] It had withheld petitioner's security

2. The merchant seaman security screening program is administered by the United States Coast Guard under the Magnuson Act, Executive Order 10173, as amended, and regulations promulgated

clearance for some five years, and thus deprived petitioner of his right to continue to earn his living as a licensed shipmaster.

The Government filed no answer, but it filed a Motion for Summary Judgment. The U. S. District Court allowed that preliminary motion. 8a.

The plaintiff appealed and the Court of Appeals for the Third Circuit affirmed because it concluded that petitioner's cause of action fell within the "interference with contract rights" exception to the Federal Tort Claims Act: 28 U. S. C. 2680(h). 17a.

In reaching that conclusion that Court of Appeals relied upon the United States District Court for the Northern District of California in Builders Corporation of America v. United States, 148 F. Supp. 482. The Third Circuit so relied even though the Ninth Circuit had reversed on the particular legal proposition there and here at issue. 259 F. 2d 766 (1958).[3]

A petition for rehearing was filed noting that reversal by the Ninth Circuit. The Per Curiam Opinion denying rehearing is set forth in full:

> "The petition for rehearing is premised on the fact that in our Opinion filed February 24, 1959, we cited with approval Builders Corporation of America v. United States, 149 F. Supp. 482 (N. D. Cal. 1957), and the fact that the United States Court of Appeals for the Ninth Circuit had reversed in that case. 259 F. 2d 766 (1958)."

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thereunder by the Commandant of the Coast Guard. The facts relating to petitioner's denial and subsequent allowance of security clearance are set forth in *Dupree v. U. S.*, 247 F. 2d 819.

Many of the West Coast merchant seaman security screening procedures have been found to be denials of due process. *Parker v. Lester*, 227 F. 2d 708; *Lester v. Parker*, 235 F. 2d 787.

3. Neither defendant nor plaintiff had cited in briefs nor mentioned in oral argument the Court of Appeals' or the District Court's adjudication in the Builders Corporation action.

"Upon consideration we are of the opinion that the reversing opinon is inapposito in that it was premised on considerations absent in the instant case." 21a.

Chief Judge Biggs dissented with an Opinion. 22a.

QUESTION.

Does the "interference with contract rights" exception to the Federal Tort Claims Act apply to interference with a licensed shipmaster's right to seek to earn his living as a shipmaster?

REASONS FOR GRANTING THE WRIT.

1. There Is a Conflict Between the Ninth Circuit and the Third Circuit Regarding a Substantial Issue of Statutory Interpretation.

The conflict between the 9th Circuit and the 3rd Circuit arises from opposing interpretations of the "interference with contract rights" exception to the Federal Tort Claims Act.

In the Builders Corporation action in the 9th Circuit and the instant action in the Third Circuit, each plaintiff sought damages arising from tortious conduct by Government officers. Neither action was based upon a contractual or prospective contractual relationship with the Government.

In the Builders Corporation case the U. S. District Court for the Northern District of California held the "interference with contract rights" exception barred recovery because interference with a prospective contract was tantamount to interference with a present contract.

The Court of Appeals for the Third Circuit relied upon that reversed adjudication and adopted the California Dis-

trict Court's concept, holding that interference with prospective contract right was similar to interference with a present contract right.

The Third Circuit so held even though petitioner sought no and had no Government contract nor employment, and even though petitioner's action was based upon defendant's interference with petitioner's right to seek employment on a vessel in the civilian Merchant Marine.

In the Builders Corporation action plaintiff neither had nor sought Government contracts. In that action the plaintiff sought to lease apartments to third parties.

The action in each circuit was based upon the Government's interference with the plaintiff's right to seek to enter economically advantageous relationships with other third parties.

The Ninth Circuit held that such an interference *was not necessarily within* the "interference with contract rights" exception to the Federal Tort Claims Act.

The Third Circuit held that such an interference *was necessarily within* "the interference with contract rights" exception to the Federal Tort Claims Act.

This conflict between those two Circuits is clearly noted in Chief Judge Biggs dissent:

> "The decision in this case is in apparent conflict with that of the Court of Appeals of the Ninth Circuit, in *Builders Corporation of America v. United States*, 259 F. 2d 766 (1958), reversing the United States District Court for the Northern District of California, 148 F. Supp. 482 (1958). The issue presented which involves interpretation of the 'interference with contract rights' exception to the Federal Tort Claims Act, 28 U. S. C. § 2680(h), is an important one."

> "In the case at bar, as in Builders Corporation of America, the Ninth Circuit case, no 'actual interference with contract rights' was alleged. Dupree had no con-

tract for employment with any ship or shipowner with which the United States Coast Guard could have interfered. In the Builders Corporation case that company had no existing contracts with which the United States Army could interfere. In both cases there was alleged interference by government officers with prospective economic advantages to plaintiffs. See 259 F. 2d at 769, and the concurring opinion of Judge Pope, *id.*, at p. 773. In the Builders Corporation case, as in the case at bar, advantageous contracts could have come to the respective plaintiffs had the government official withheld his hand. The interposition by the Coast Guard in the instant case was in fact a deprivation of Dupree's right to earn a living as a licensed shipmaster rather than an interference with any actual contract right. It is difficult to find a helpful analogy but Dupree's position after the Coast Guard failure or refusal to award him security clearance, was not unlike that of a lawyer, admitted to the bar of a court, who by action of that court is not permitted to practice law before it. Such an individual still remains an attorney but he has been put in a position where he will not be retained by clients and will be unable to procure contracts of employment."

"In my opinion the provisions of Section 2680(h) are too broadly construed by the decision of this court. The statute, necessary for the preservation of our national security, nonetheless imposed on Dupree a disability analogous to a penalty, and for this reason its provisions should be contrued strictly as if they were penal in nature."

"Negligent conduct by the Coast Guard is alleged sufficiently in the complaint."

"The court granted leave to the plaintiff to file his petition for rehearing but now denies the prayers

of his petition. I think that the denial is erroneous and that a substantial issue of statutory interpretation is presented which should be explored fully by this court sitting en banc."

"For the foregoing reasons I must respectfully dissent." 21a-22a.

In confirmation of Chief Judge Biggs conclusions it should be noted that there may be a conflict between the Third Circuit's concept, and in situations such as existed in *Indian Towing Co. v. U. S.*, 350 U. S. 61, 76 S. Ct. 122, 100 L. Ed. 48; *Rayonier v. U. S.*, 352 U. S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354; *U. S. v. Union Trust Co.*, 250 U. S. 907, 76 S. Ct. 192, 100 L. Ed. 799 and *Hatahley v. U. S.*, 351 U. S. 173, 76 S. Ct. 745, 100 L. Ed. 1065. This is so for the defendant's conduct in those situations interfered with those plaintiffs' property rights.

There is slight distinction between those interferences with property rights and the interference with petitioner's property right. The right to freely seek prospective employment is a property which the law recognizes and will protect. *Traux v. Raich*, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131; *Parker v. Lester*, 227 F. 2d 708, 713.

2. The Statutory Interpretation Involved Has Never Been Considered by This Court.

This Court has never considered the scope of the "interference with contract rights" exception to the Federal Tort Claims Act.

Does that exception apply whenever the resulting injury impairs the plaintiff's future right to enter a contract? The Third Circuit seems so to have held.

The Ninth Circuit recognized the problem but did not resolve it.

"As to whether the facts here alleged could found an action in tort or in contract or in tort with a sub-

sidiary basis in contract, no opinion is expressed. If a cause of action in contract is pleaded, it might well not be within the jurisdiction of the District Court." *Builders Corporation of America v. U. S.*, 259 F. 2d 766, 772.

In a concurring Opinion Circuit Judge Fee wrote:

"Tortious conduct destructive of appellant's 'right to negotiate' for tenants may well be something not within the stated exception relating to 'contract rights' ". 259 F. 2d 766, 773.

3. The Third Circuit Adjudication Is in Conflict With This Court's Expressed Philosophy.

This Third Circuit's adjudication imposes on the petitioner, an individual, the burden of himself bearing the injury resulting from defendant's negligence.

This Court, in *Rayonier, Inc., v. U. S.*, 352 U. S. 315, 77 S. Ct. 374, stated at page 320:

> "Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees."

The merchant seaman security screening program was instituted and operated for the security and benefit of the entire United States. It was the negligent application or operation of that national program that injured petitioner. To require him, as does the Third Circuit, to assume the

entire burden of that injury, imposes upon him, an individual, grievous harm.[4]

4. There Is a Substantial Issue Involved.

On March 29, 1959, the Government's Motion for Summary Judgment was allowed in the current action of *Parker v. Lester*, No. 36830, U. S. District Court for the Northern District of California.[5] That District Court so allowed exclusively on the authority of the case at bar.

The Parker action, like the instant action, arises from the Government's interference with individuals' rights to seek to obtain employment in the Merchant Marine. The current Parker action, like the prior Parker actions[6], is a class action.

This Court's consideration of and final disposition of the instant action will control the disposition of the multiple claims included in that Parker class action.

5. The Liability of the Government for Its Negligent Operation of Its Merchant Seaman Security Screening Program Is at Issue.

This Court has adjudicated that the Government is liable for resulting damage from its negligent maintenance of navigation lights; *Indian Towing Co. v. U. S.*, 350 U. S. 61, 76 S. Ct. 122, 100 L. Ed. 48, control of forest fires; *Rayonier v. U. S.*, 352 U. S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354, opera-

4. In other phases of the federal personal security program it has been recognized that a reinstated employee or one whose clearance is reinstated is entitled to reimbursement of his loss of earnings. For reinstated Government employees the Act of Aug. 26, 1950, c. 803, § 1, 64 Stat. 476 (5 U. S. C. 22-1) requires reimbursement. For reinstated employees of private industry the Department of Defense Industrial Review Regulations (Directive issued Feb. 2, 1955, No. 5220.6 as amended March 19, 1959) by Section 26 thereof requires reimbursement.

5. On May 8, 1959, plaintiff in that action filed Notice of Appeal.

6. *Parker v. Lester*, 227 F. 2d 708; *Lester v. Parker*, 255 F. 2d 787.

tion of an airport; *U. S. v. Union Trust Co.*, 250 U. S. 907, 76 S. Ct. 192, 100 L. Ed. 799, regulation of grazing lands; *Hatahley v. U. S.* 351 U. S. 173, 76 S. Ct. 745, 100 L. Ed. 1065, and that the Government's liability is comparable to an individual's liability as determined by the applicable local law, *Rayonier v. U. S.*, 352 U. S. 315, 318, 77 S. Ct. 374, 1 L. Ed. 2 354. This petitioner presents the question of the Government's liability when it elects to regulate another civilian's activity.

Under the local law here involved, Pennsylvania law, one is liable for the harm caused by preventing another to enter into business relations with a third person. *Walh v. Strous*, 344 Pa. 402, 403; *Klauder v. Cregar*, 327 Pa. 1, 3; and cases collected at Sec. 766, Restatement of Torts, Pennsylvania Annotations.

The U. S. Coast Guard prevented petitioner from entering into employment with a third party, the owner or operator of a merchant vessel.

Even though the Government may have been acting in a purely Governmental function, that fails to establish its conduct was privileged. This is so for the Federal Tort Claims Act does not distinguish between governmental and non-governmental conduct. *Indian Towing Co. v. U. S.*, 350 U. S. 61; 76 S. Ct. 122, 100 L. Ed. 48; *Rayonier v. U. S.*, 352 U. S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354.

The fact that the Government acted in the interest of national security also fails to establish the Government's conduct was privileged. *Cole v. Young*, 251 U. S. 538, 76 S. Ct. 861, 100 L. Ed. 1396.

Respectfully submitted,

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Attorney for Petitioner.

Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 23300.

EUGENE DUPREE

v.

THE UNITED STATES OF AMERICA.

COMPLAINT.

AND NOW comes the plaintiff, Eugene Dupree and presents this his Complaint arising from the United States prohibiting third parties from employing him in that the defendant so prohibited in the absence of use of reasonable care to determine that the interests of national security required such a prohibition, even though such prohibition directly and of necessity caused plaintiff to suffer injuries, damages and losses, in support whereof the plaintiff alleges:

1. The jurisdiction of this Court is based upon the Federal Tort Claims Act, June 25, 1948, C. 646, 62 Stat. 983-4 as thereafter amended (28 U. S. C. 2674 & 2680); (28 U. S. C. 1346 (b)).

2. The plaintiff, Eugene Dupree, resides at 125 S. 21st Street, Philadelphia, Pennsylvania, and is a birthright citizen of the United States.

3. The United States Coast Guard is an agency of and part of the United States Government, being within the Treasury Department of the United States.

4. During September 1950, the United States Coast Guard, as a part of the United States Government, determined and advised the plaintiff that no third party could employ him on any vessel of the United States Merchant Marine.

5. Thereafter, on May 23, 1951, the United States Coast Guard, as a part of the United States Government, advised the plaintiff that its aforesaid determination of September 1950 was based upon the belief that the plaintiff had been affiliated with or was sympathetic with an organization or group or persons subversive to or disloyal to the United States.

6. Nevertheless, during the period here in question the United States Coast Guard, as a part of the United States Government, issued and re-issued to the plaintiff a master's or captain's license, and at no time revoked or sought to revoke that duly issued license.

7. Nevertheless, the United States Coast Guard, as a part of the United States Government continued to refuse to permit third parties to employ plaintiff on any United States vessel throughout the period from September 1950 to November 1955.

8. For the reasons set forth hereafter in paragraphs 9, 10 and 11, the Coast Guard's aforesaid refusal to permit third parties to employ plaintiff was improper, unwarranted, unreasonable, unjustifiable and negligent and therefore not a privileged invasion of the plaintiff's right to obtain employment with such third parties.

9. Prior to May 23, 1951, such invasion was unreasonable, unjustifiable and negligent in that the defendant had, up until that time, prevented plaintiff's employment in the absence of affording the plaintiff any administrative proceeding in which he could seek to establish that the interest of national security did not require the aforesaid refusal to permit his employment by such third parties.

10. Subsequent to May 23, 1951, such invasion was improper, unwarranted, unreasonable, unjustifiable and negligent for the administrative inquiries or proceedings afforded the plaintiff were improperly, unwarrantedly, unreasonably, unjustifiably and negligently conducted in that the defendant, prior to and at those inquiries and proceedings, refused to produce, disclose or identify any of its witnesses or evidence which established that the plaintiff was affiliated with or sympathetic with an organization or group of persons subversive to or disloyal to the United States.

11. Furthermore, the defendant's refusal to permit plaintiff's employment was improper, unwarranted, unreasonable, unjustifiable and negligent in that plaintiff throughout said period himself and by his evidence denied all disclosed allegations that he was affiliated with or sympathetic with an organization or group of persons subversive to or disloyal to the United States, or that he had participated in activities indicating that he was so affiliated or so sympathetic.

12. During said period while the defendant prohibited third parties from employing the plaintiff, plaintiff was a member in good standing of the National Masters, Mates and Pilots of America, thus had a right to and a means of obtaining employment as an officer in the United States Merchant Marine.

13. Furthermore, during the aforesaid period there was a shortage of available ship's officers, which shortage was recognized by the defendant.

14. As a result of said prohibition the plaintiff has suffered loss of wages or earnings and other rights as an employed ship's officer such as seniority, social security, pension and the sundry rights and privileges specified by the appropriate labor contracts between National Masters, Mates and Pilots of America and the operators of vessels

of the United States Merchant Marine; and furthermore, the aforesaid prohibition caused plaintiff humiliation and disgrace, which amongst other things caused a permanent physical disability to plaintiff's eyes.

WHEREFORE plaintiff brings this action for the sum of $100,000.

/s/ WILLIAM J. WOOLSTON,
William J. Woolston,
2015 Land Title Building,
Philadelphia 10, Pa.,
Attorney for Plaintiff.

MOTION TO DISMISS.

(Filed 11-7-57.)

Defendant United States of America moves the Court to dismiss the plaintiff's Complaint and assigns therefor the following reasons:—

1. The Complaint fails to state a cause of action against defendant upon which relief can be granted.

2. The Complaint fails to state a cause of action against the defendant with respect to which the United States has consented to be sued, as set forth in Title 28 U. S. C. Section 2680.

3. The Court lacks jurisdiction of the subject matter of this action.

4. The Complaint establishes on its face that the action has not been commenced within two years next following the alleged wrongful acts on the part of the defendant or any agency thereof.

5. The instant suit presents the identical factual and legal issues which have been decided previously against the plaintiff by the United States District Court for the Eastern District of Pennsylvania in Civil Action Number 208 [illegible] and affirmed by the United States Court of Appeals [illegible] Third Circuit in Appeal number 12,147.

/s/ HAROLD K. WOOD,
Harold K. Wood,
United States Attorney.

/s/ HENRY J. MORGAN,
Henry J. Morgan,
Assistant United States Attorney.

OPINION OF THE U. S. DISTRICT COURT IN NO. 23,300.

GANEY, *J.* March 10, 1958

On June 13, 1956, plaintiff brought an action (Civil Action No. 20,873) in this court under the Federal Tort Claims Act, 28 U. S. C. A. § 1346(b), seeking damages resulting from the allegedly "illegal and unconstitutional" denial of his application for a security clearance by the Commandant of the Coast Guard. Without such clearance, as evidenced by a validated document or certificate, plaintiff, who possessed a five year license which certified his fitness to be a master of a merchant vessel, could not obtain employment on a vessel of American registry. The reason for the clearance denial was the Commandant's belief that plaintiff's presence on board a merchant vessel of the United States would be inimical to the security of the United States. The complaint contained no allegation of negligence nor did it describe any conduct of any employee of the Government as being wrongful. On November 5, 1956, Judge John W. Lord, Jr. granted the Government's motion to dismiss the complaint on the ground that the claim stated came within the discretionary function exception of § 2680(a), 28 U. S. C. A. 146 F. Supp. 148. Judgment of dismissal was entered on the same day.

On appeal, in a careful, painstaking and well documented opinion, the United States Court of Appeals for the Third Circuit, speaking through Circuit Judge Kalodner, affirmed the judgment of the District Court on June 10, 1957, without granting leave to amend the complaint. A petition for rehearing was denied on July 11, 1957. 247 F. 2d 819.

The Court of Appeals agreed with the reason for the District Court's action as to the Commandant of the Coast Guard, but since there was "a paucity of facts upon which to determine the extent of discretion exercised by the vari-

ous officials acting with respect to Dupree", the Court was of the opinion that "this is not a proper case to test the applicability of that exception." 247 F. 2d, supra, at 825. However, concerning the official representatives enforcing the regulations of the Coast Guard Commandant, the Court held that the claim stated in the complaint came within the "exercising due care" exception of § 2680(a). The reason for the latter holding being that the complaint did not allege lack of due care in the application of the regulations of the Commandant of the Coast Guard to plaintiff.

On July 17, 1957, this court received the mandate of the Court of Appeals affirming the judgment of the District Court. No mention is made in the mandate concerning permission for plaintiff to amend the complaint.

On September 19, 1957, plaintiff filed another complaint in this court under the same provisions of the Federal Tort Claims Act. With certain additional clarifying allegations, the claim stated in the complaint is a restatement of the claim set forth in Civil Action No. 20,873. The "new" element, if it may be characterized as such, which has been added is summarized in paragraph number 8. That paragraph avers that the Coast Guard's refusal to permit others to employ plaintiff on board vessels was "improper, unwarranted, unreasonable, unjustifiable and negligent" and was therefore an invasion of his right to employment.

To this complaint the Government has also filed a motion to dismiss on the ground that it presents the identical factual and legal issues which have been decided previously against the plaintiff in Civil Action No. 20,873, and if the matter is not res judicata, it is barred by the two-year statute of limitations. Moreover, the Government continues, if the matter is not barred, the complaint fails to state a cause of action against the Government upon which relief can be granted.

Since it is our view that the complaint does not set forth a new claim, but at most a new ground for the old claim, the filing of the complaint is nothing more than an

attempt on the part of the plaintiff to amend the complaint in Civil Action No. 20,873. He has not indicated that he could not have or give any reason why he did not present to the Court of Appeals in that action the allegations he now makes in the complaint before us. Under these circumstances we have no power to rule on the propriety of his request to amend. *Ginsburg v. Stern*, 242 F. 2d 379 (C. A. 3, 1957); *Butcher & Sherrerd v. Welsh*, 206 F. 2d 259, 262 (1953). Before we may have such power, plaintiff must first obtain an order of our Court of Appeals granting leave to this court to consider his request to amend his complaint under Rule 60(b) of the Federal Rules of Civil Procedure. See *Federal Deposit Insurance Corp. v. Alker*, 223 F. 2d 263 (C. A. 3, 1955).

Accordingly, the Government's motion to dismiss the complaint will be allowed on the ground that this court is without power at this time to entertain it.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,617

EUGENE DUPREE,
Appellant

v.

THE UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 23, 1958

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*

OPINION OF THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT IN NO. 12,617.

(Filed February 24, 1959)

By KALODNER, *Circuit Judge*

Can an action for damages be maintained against the United States under the Federal Tort Claims Act [1] on a claim premised upon an alleged negligent interference with a merchant seaman's prospective economic advantage, viz., future employment?

That is the critical question presented by this appeal from the Order of the District Court dismissing a complaint filed by Eugene Dupree, a licensed ship's master, charging alleged negligent withholding of a security clearance by the Commandant of the United States Coast Guard in the

1. 28 U. S. C. §§ 1346(b), 2671, 2674, 2680(h) are the relevant sections.

course of enforcement of the government's merchant seamen screening program.

The merchant seamen screening program is administered by the United States Coast Guard under the Magnuson Act, Executive Order 10173, as amended,[2] and regulations promulgated thereunder by the Commandant of the Coast Guard.[3] Pursuant to their provisions, Dupree's security clearance was withheld by the Commandant upon his determination that there was reason to believe that he was affiliated with or sympathetic to subversive or disloyal organizations. After a lapse of some five years Dupree was ultimately given a clearance. The facts relating to the denial of the clearance and its ultimate issuance are detailed in our prior opinion, Dupree v. United States, 247 F.2d 819 (1957), rehearing denied, wherein we affirmed the judgment of the District Court[4] dismissing Dupree's complaint.

In the opinion cited we specifically noted with respect to Dupree's complaint that "It contains no allegations of negligence, nor does it describe any conduct of any employee of the Government as being wrongful" and "There is no allegation of lack of due care in the application of the regulations to Dupree"; that the complaint in substance merely alleged "insufficiencies in the administrative procedure such as the failure to afford a hearing prior to the initial determination" etc. and was "based upon nothing more than the invalidity of the regulations under which his security clearance was processed.".

On the score of the allegations of "insufficiencies in the administrative procedure" and the "invalidity of the regulations" we held that "Where government employees act pursuant to and in furtherance of regulations, resulting harm is not compensable under the act [Federal Tort

2. 15 F. R. 7005, 16 F. R. 7537, 17 F. R. 4607; 33 C. F. R. (1956 Supp.), Part 6.

3. 15 F. R. 9327, as amended, 33 C. F. R. (1956 Supp.), Part 121.

4. Dupree v. United States, 146 F. Supp. 148 (E. D. Pa. 1956).

Claims Act] . . . except where they do not exercise due care." In doing so we observed that the Tort Claims Act did not contemplate a remedy for damages sustained by reason of the application of invalid laws or regulations.

It may also be noted that, although the District Court in its opinion had premised its dismissal of Dupree's original complaint on the ground that it was barred by the discretionary function exception of the Act,[5] we specifically stated that the case in its then posture did not require decision as to the applicablity of the discretionary function exception since there was absent any allegation that the Coast Guard had failed to use due care in the application of the regulations.

It must further be stated that in the earlier litigation the parties did not, either in the District Court or on appeal, present, nor did we consider, the issue which we consider critical in the instant appeal, viz., does the Tort Claims Act permit maintenance of a claim for damages for negligent interference with future employment.

The issue is squarely presented now, although, as in the initial litigation, the parties have made no reference to it, either below or here. Instead they have focused their contentions on other grounds: Dupree urges that his present complaint presents a "new" cause of action based upon "unreasonable, unjustifiable and negligent" interference with, and "invasion" of his "right to obtain employment", with specific allegation of "absence of reasonable care", and, should it be regarded "as an amended complaint", it is permissible under Rule 15(a), or, in the alternative, this Court can, and should, grant permission to file an amended complaint; the government, in reply, says the instant appeal brings the same cause of action before the Court as the original complaint and presents only questions of pleading and procedure and (1) the District Court correctly held it was without power to entertain the second complaint or to permit an amendment, (2) this Court should not grant permission to amend, and, (3) the prior judgment, dismissing

5. 28 U. S. C. 2680(a).

Dupree's complaint for failure to state a cause of action, is res judicata and bars the instant action.

It would serve no useful purpose to discuss the contentions recited inasmuch as we are of the opinion that in the interest of expeditious administration of justice we must at once come to grips with the issue which must ultimately be decided even should we subscribe to any of the points raised by Dupree.

We are of the opinion that by its clear terms the Tort Claims Act, in Section 2680(h), excludes invocation of the relief granted by the Act in instances where there is interference, negligent or otherwise, by a government employee or officer, with contractual rights of an aggrieved individual.

It is plain from Dupree's complaint that he seeks recovery for negligent interference by a government agent or agency with his prospective employment.[6] In his brief he stressed the elements of the tort of interference with his prospective economic advantage and his reliance on it as the basis of his claim for damages, stating:

> "The complaint's paragraphs 4 and 7 allege that the United States Coast Guard, from September 1950 until November 1955, refused to permit third parties to employ the plaintiff. Plaintiff is a resident of Pennsylvania, and thus the Coast Guard so prevented here in Pennsylvania.
>
> "The law in Pennsylvania imposes a liability on an individual for the harm caused another by preventing that other from entering into business relations with a

6. In paragraph 4 of his complaint Dupree alleges:

> "4. During September 1950, the United States Coast Guard, as a part of the United States Government, determined and advised the plaintiff that no third party could employ him on any vessel of the United States Merchant Marine."

and in paragraph 7:

> "7. Nevertheless, the United States Coast Guard, as a part of the United States Government continued to refuse to permit third parties to employ plaintiff on any United States vessel throughout the period from September 1950 to November 1955."

third person unless the conduct of the person so preventing was privileged. Restatement of Torts, Sec. 766; Wahl v. Strous, 344 Pa. 402, 403; Klauder v. Cregar, 327 Pa. 1, 3; and cases collected in the Pennsylvania Annotations, Restatement of Torts."

The tort of interference with prospective or potential advantage is simply an extension of tort liability for interference with existing contractual relations, and the "cause of action has run parallel to that for interference with existing contracts." Prosser, Law of Torts § 107 (2d Ed. 1955), pages 745-46-47-48; Restatement, Torts § 766(a) and (b) (1939). To maintain the action it is necessary to establish that the interference be "purposeful" and "without reasonable justification". The principles stated prevail in Pennsylvania.[7]

Apart from the fact that Dupree's complaint fails to charge "intentional" conduct on the part of the Coast Guard, an essential ingredient of his cause of action,[8] the latter cannot be maintained under the Tort Claims Act because, as earlier stated, Section 2680(h) excepts from its scope, actions for "interference with contract rights."

Section 2680(h) provides:

"The provisions of this chapter [Tort Claims Act] and section 1346(b) of this title shall not apply to—

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or *interference with contract rights*" (emphasis supplied).

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7. Dora v. Dora, 392 Pa. 433, 437 (1958); Wahl v. Strous, 344 Pa. 402, 403 (1942); Klauder v. Cregar, 327 Pa. 1, 8 (1937).

8. See the Pennsylvania cases cited Note 7, supra, which are in accord with the general rule. As to other jurisdictions, see Baruch v. Beech Aircraft Corporation, 175 F. 2d 1 (10th Cir. 1949), cert. den. 338 U. S. 900; New York Trust Co. v. Island Oil & Transport Corporation, 34 F. 2d 649, 652 (2d Cir. 1929), cert. den. 281 U. S. 724; see Annotations: 84 A. L. R. 43, 49; 26 A. L. R. 2d 1227, 1245.

In Fletcher v. Veterans Administration, 103 F. Supp. 654 (E.D. Mich. 1952), an operator of a school of refrigeration sued the Veterans Administration, an agency of the United States, for loss of business due to negligent misstatements to veterans with reference to the school.

With respect to this cause of action the Court said (p. 656):

> "The alleged tortious acts of government employees set forth in the second count of plaintiff's bill of complaint do not give rise to a cause of action enforceable against the government since Congress has specifically excepted such torts from the waiver of immunity found in the Federal Tort Claims Act. The intent of Congress with respect to such claims is expressed in exception (h), Section 2680 U.S.C.A. Title 28 . . .
>
> "Since the United States of America is expressly excluded from liability in this type of action, this Court is without jurisdiction to entertain such an action, . . ."

Again in Builders Corporation of America v. United States, 148 F. Supp. 482 (N.D. Cal. 1957) where plaintiff builders alleged tort based on interference with prospective contract or business relations, it was held that Section 2680(h) barred recovery under the Tort Claims Act.

Said the Court (p. 484):

> "The alleged wrongful act of the Base Commander for which plaintiffs seek a recovery under their first cause of action appears to be the tort of 'interference with prospective advantage' . . . sometimes labeled 'interference with prospective contracts or business relations' . . . Since Congress had decided not to surrender the immunity of the United States from tort actions based on interference with contract relations, 28 U.S.C.A. § 2680(h), the essential issue which this Court must decide, then, is whether the tort of inter-

ference with prospective advantage or prospective contracts is properly includable within the aforementioned exception to the Tort Claims Act. It would seem to be quite illogical to conclude that Congress intended to exclude one tort from the operation of the Act, and, at the same time, *waive* the Government's immunity from actions sounding in a substantially identical tort; the distinction between the two being one of degree, only, in the elements necessary to establish liability."

With respect to the distinction mentioned, the Court made these pertinent observations (footnote 1, p. 484):

"Both the tort of interference with contract relations and the tort of interference with prospective contract or business relations involve basically the same conduct on the part of the tortfeasor. In one case the interference takes place when a contract is already in existence, in the other, when a contract would, with certainty, have been consummated but for the conduct of the tortfeasor. (See Prosser on Torts, p. 720 et seq., and p. 745 et seq. [2d Ed. 1955]). Rather than characterizing the two as separate torts, the more rational approach seems to be that the basic tort of interference with economic relations can be established by showing, *inter alia*, an interference with an existing contract or a contract which is certain to be consummated, with broader grounds for justification of the interference where the latter situation is presented."

In United States v. Ein Chemical Corporation, 161 F. Supp. 238, 246, 247 (S.D. N.Y. 1958), decided on other grounds, the Court inferentially subscribed to the doctrine of the Fletcher and Builders Corporation cases.

Since Section 2680(h) excepts from the purview of the Tort Claims Act actions for "interference with contract rights" Dupree cannot maintain the instant suit.

As was said in Munro v. United States, 303 U.S. 36 (1938) (p. 41):

> "Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed. Reid v. United States, 211 U.S. 529, 538 . . ."

For the reasons stated the Order of the District Court will be affirmed.

JUDGMENT OF THE U. S. COURT OF APPEALS IN NO. 12,617.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed:

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

February 24, 1959.

ORDER IN NO. 12,617.

Present: MCLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

AND NOW, to wit, this 10th day of March, 1959, it is

ORDERED that the second full paragraph on page 3 be amended to read as follows:

"It must further be stated that in the earlier litigation we did not reach the issue which we consider critical in the instant appeal, viz., does the Tort Claims Act permit maintenance of a claim for damages for negligent interference with future employment."

By THE COURT,

KALODNER, *J.*

PRAYER FOR PERMISSION TO FILE PETITION FOR REARGUMENT.

(No. 12,617)

And Now comes petitioner, by his attorney William J. Woolston, and prays this Court's permission to file this petition for rehearing. This Court entered its judgment and Opinion on February 24, 1959. Thereafter this Court slightly modified that Opinion by an Order of March 10, 1959, and on that same day the Clerk was instructed to advise petitioner that if he desires "reargument * * * the proper procedure is to file a petition for rehearing."

Petitioner prays that this Court enlarge the fifteen days specified by Rule 33 in order to permit the filing of the attached petition.

Respectfully submitted,

William J. Woolston,
2015 Land Title Bldg.,
Philadelphia 10, Pa.,
Attorney for Petitioner.

PETITION FOR REHEARING

(No. 12,617)

And Now comes petitioner, by his attorney, William J. Woolston, Esq., and prays this Court to grant a rehearing for the following reasons:

1. The Opinion of this Court cites and quotes from Builders Corp. of America v. U. S., 148 Fed. Supp. 482, and now the Court of Appeals for the Ninth Circuit has reversed and its Opinion is now available at 259 Fed. 2d 766.

2. The cited and quoted Opinion of the U. S. District Court for the Northern District of California sustained the preliminary motion to dismiss because it found that interference with prospective contract rights was similar to interference with existing contract rights, and the latter was exempt from the Tort Claims Act.

3. The Court of Appeals in reversing distinguished interference with contract rights from interference with a right to seek to obtain contract or employment rights, and as the latter is a right independent of existing or prospective contracts, it follows that an interference of that right is without the interference of contract rights exception to the Tort Claims Act.

4. That distinction between contract rights and the right to seek to obtain a contract right was not observed by the cited and quoted Opinion of the U. S. District Court for the Northern District of California, nor was it observed in any of the other cited authorities.

5. Both the Builders Corp. of America and Dupree base their actions on such an interference of their right to seek to obtain contracts or employment rights. Neither the Builders Corp. of America nor Dupree base their ac-

tions upon an interference with existing or prospective contract rights.

6. This Court, in citing and quoting from the aforementioned U. S. District Court for the Northern District of California, overlooked the distinction between contract rights and the right to seek to obtain contract rights.

7. The right to seek to obtain a contract or employment rights is a recognized right protectable by law. *Truax v. Rich*, 239 U. S. 33.

Respectfully submitted,

WILLIAM J. WOOLSTON,
2015 Land Title Bldg.,
Philadelphia 10, Pa.,
Attorney for Petitioner.

It is certified by the undersigned that the above petition for rehearing is presented in good faith and not for delay.

WILLIAM J. WOOLSTON.

OPINION
UR PETITION TO FILE PETITION FOR REARGUMENT OUT OF TIME AND PETITION FOR REHEARING.

(Filed May 8, 1959)

PRESENT: BIGGS, *Chief Judge*, MCLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*

PER CURIAM:

The petition of Eugene Dupree for leave to file petition for reargument out of time is granted.

The petition for rehearing is premised on the fact that in our Opinion filed February 24, 1959, we cited with approval Builders Corporation of America v. United States, 148 F. Supp. 482 (N. D. Cal. 1957), and the fact that the United States Court of Appeals for the Ninth Circuit had reversed in that case, 259 F.2d 766 (1958).

Upon consideration we are of the opinion that the reversing opinion is inapposite in that it was premised on considerations absent in the instant case.

For the reasons stated the petition for rehearing will be denied.

BIGGS, *Chief Judge*, dissenting.

The decision in this case is in apparent conflict with that of the Court of Appeals of the Ninth Circuit in Builders Corporation of America v. United States, 259 F.2d 766 (1958), reversing the United States District Court for the Northern District of California, 148 F. Supp. 482 (1958). The issue presented, which involves interpretation of the "interference with contract rights" exception to the Federal Tort Claims Act", 28 U.S.C. § 2680(h), is an important one.

In the case at bar, as in Builders Corporation of America, the Ninth Circuit case, no "actual interference with contract rights" was alleged. Dupree had no contract

for employment with any ship or shipowner with which the United States Coast Guard could have interfered. In the Builders Corporation case that company had no existing contracts with which the United States Army could interfere. In both cases there was alleged interference by government officers with prospective economic advantages to plaintiffs. See 259 F.2d at p. 769, and the concurring opinion of Judge Pope, *id.*, at p. 773. In the Builders Corporation case, as in the case at bar, advantageous contracts could have come to the respective plaintiffs had the government official withheld his hand. The interposition by the Coast Guard in the instant case was in fact a deprivation of Dupree's right to earn a living as a licensed shipmaster rather than an interference with any actual contract right. It is difficult to find a helpful analogy but Dupree's position after the Coast Guard failure or refusal to award him security clearance, was not unlike that of a lawyer, admitted to the bar of a court, who by action of that court is not permitted to practice law before it. Such an individual still remains an attorney but he has been put in a position where he will not be retained by clients and will be unable to procure contracts of employment.

In my opinion the provisions of Section 2680(h) are too broadly construed by the decision of this court. The statute, necessary for the preservation of our national security, nonetheless imposed on Dupree a disability analogous to a penalty, and for this reason its provisions should be construed strictly as if they were penal in nature.

Negligent conduct by the Coast Guard is alleged sufficiently in the complaint.

The court granted leave to the plaintiff to file his petition for rehearing but now denies the prayers of his petition. I think that the denial is erroneous and that a substantial issue of statutory interpretation is presented which should be explored fully by this court sitting en banc.

For the foregoing reasons I must respectfully dissent.

ORDER
SUR PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge*; MCLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Chief Judge Biggs dissents.

Attest:

IDA O. CRESKOFF,
Clerk.

Dated: May 8, 1959.

PAPERS IN PREVIOUS APPEAL INCORPORATED BY REFERENCE.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,147

EUGENE DUPREE,
Appellant

v.

THE UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 2, 1957

Before MARIS, KALODNER and STALEY, *Circuit Judges.*

OPINION OF THE COURT.
(Filed June 10, 1957)

By KALODNER, *Circuit Judge.*

Can an action be maintained against the United States for damages under the Federal Tort Claims Act on a claim arising out of the enforcement of the merchant seaman screening program, which resulted in the allegedly wrongful withholding of a security clearance by the Commandant of the Coast Guard acting pursuant to the recommendations of hearing boards performing functions under regulations promulgated by the Commandant?

That is the question presented on this appeal from the judgment of the District Court for the Eastern District of Pennsylvania granting the motion of the United States to

dismiss the complaint. The district court held that the claim was barred by the discretionary function exception of the Federal Tort Claims Act.[1]

In order to test the legal validity of the complaint, the allegations of fact therein are taken as admitted and may be summarized as follows:

Eugene Dupree was a licensed ship's master from 1930 through 1956 by virtue of a license granted to him by the United States Coast Guard.[2] In September, 1950, Dupree applied for a berth as a ship's master, but the Coast Guard refused to issue to him the validated document required for employment in the merchant marine. On May 23, 1951, he was advised by the Coast Guard that the validated document had been denied because the Commandant of the Coast Guard had determined that there was reason to believe that he had been affiliated with or was sympathetic to an organization, group or combination of persons subversive or disloyal to the Government of the United States. This determination was made without affording Dupree a hearing.

Dupree subsequently requested and was given a hearing for the purpose of establishing that he was not affiliated with or sympathetic to an objectional organization. Neither prior to nor at the hearing was he advised upon what information the Commandant had based his determination.[3] Thereafter Dupree invoked the appeal procedures. At no time was he confronted with any witnesses or evidence in support of the Commandant's determination despite his repeated denials of the charges.

In November, 1955, the Commandant reversed the determination against Dupree making him eligible for employment as a ship's master. Dupree then instituted an

1. Dupree v. United States, 146 F. Supp. 148 (E. D. Pa. 1956).
2. The Coast Guard issues licenses pursuant to 46 U. S. C. § 226.
3. During the course of the appeal proceedings Dupree was given a "Bill of Particulars" setting forth the specific data upon which the adverse determination was based. The "Bill of Particulars" is quoted in full in Dupree v. United States, 141 F. Supp. 773 (Ct. Cls. 1956).

action against the United States in the Court of Claims. The motion of the United States to dismiss that complaint was sustained for failure to state a claim within the class of cases cognizable in the Court of Claims.[4]

The instant action was instituted in the district court as a "Complaint in Trespass" under the Federal Tort Claims Act. That act provides:

> 28 U.S.C. § 1346(b). "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
>
> 28 U.S.C. § 2674. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Dupree sought $100,000 damages for loss of earnings, for legal and other expenses incurred in obtaining his clearance, for an alleged incurable physical disability resulting from the nervous strain he underwent while clearance was withheld, and for the humiliation, disgrace and consequent pain and suffering as a result of the determination that he was affiliated with subversive or disloyal groups.

Both the United States and Dupree have in essence based their contentions upon the question of the applicability of the discretionary function exception of the Tort Claims Act which is set forth in the second part of 28

4. *Ibid.*

U.S.C. § 2680(a), and which excludes recovery under the act for

> "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Viewing the complaint as we do, that exception is not exclusively critical to the disposition of this case for the reasons as set forth below.

Dupree was denied a security clearance under the merchant seaman screening program which is administered by the Coast Guard under the authority of the Magnuson Act,[5] and Executive Order 10173, as amended.[6] Pursuant to this authority the Commandant of the Coast Guard promulgated regulations to enforce the security program.[7]

The Magnuson Act was enacted by Congress in August, 1950 during the Korean crisis. It provides that whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or by reason of subversive activity, or of disturbances in the international relations of the United States, he may issue rules and regulations to safeguard vessels and waterfront facilities against destruction from sabotage or other subversive acts. Pursuant to this act the President issued Executive Order 10173 in which he prescribed regulations relating to the protection and security of vessels, harbors and waterfront facilities.

The regulations, as amended, authorized the Commandant of the Coast Guard to require that licensed officers and certified men employed on merchant vessels of the United States be holders of specially validated documents reflecting their security clearance. The regulations further provided:

5. 64 Stat. 427 (1950), 50 U. S. C. § 191.
6. 33 C. F. R. (1955 Supp.) Part 6.
7. *Id.* Part 121.

> "No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States; Provided, That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply."[8]

The implementing regulations promulgated by the Commandant of the Coast Guard set forth detailed procedures for the enforcement of the Executive Order. Application for security clearance was to be in writing and was to contain certain specified information.[9] Without affording the applicant a hearing, the Commandant could deny the applicant a security clearance on certain specified grounds.[10] However, whenever security clearance was denied, the applicant was to be notified in writing and a statement of the basis of the initial determination was to be included, but not "with such particularity as to disclose the source of such information or data, nor the identity of any person or persons who may have furnished such information or data, to said person or other persons."[11]

Any person who was denied a security clearance under these regulations was given rights of appeal[12] to a Local Appeal Board which was composed of one representative of the Coast Guard, one representative of management, and one representative of labor, so far as practicable.[13] The Board was to furnish the appellant with a written notifica-

8. *Id.* § 6.10-1.
9. *Id.* § 121.13(b).
10. *Id.* § 121.13(d).
11. *Id.* § 121.15(e)(1)(3), as amended Nov. 3, 1953, 18 Fed. Reg. 6941. The "Bill of Particulars" referred to in Note 3, *supra*, was not required prior to this amendment.
12. 33 C. F. R. § 121.17.
13. *Id.* § 121.19(a).

tion as to the data on which the adverse determination had been made, subject to the restrictions concerning the disclosure of the source of the information or the identity of the persons furnishing it.[14] The hearings were to be held with due regard to the security of the United States, and the technical rules of evidence did not apply.[15] After hearing, the Board was to transmit its recommendation, together with its reasons, to the Commandant who then could either approve or reject the recommendation or remand the case for further proceedings. The Commandant would notify the applicant of the decision.[16] If the decision was adverse to the applicant, an appeal was allowed to the National Appeal Board which also conducted hearings and transmitted its recommendations to the Commandant.[17] The final authority to grant or deny security clearance was vested in the Commandant.[18]

It is alleged that in applying these regulations to Dupree he suffered great injury. Whatever the extent of that injury no legal duty arises upon the part of the United States to reimburse him unless provision has been made therefor in the Federal Tort Claims Act or other compensatory constitutional or statutory provisions. The complaint against the United States is entitled "Complaint in Trespass" and it is alleged that "[t]his action sounds in tort . . ." It contains no allegations of negligence, nor does it describe any conduct of any employee of the Government as being wrongful. The allegations in substance merely state the alleged insufficiencies in the administrative procedure such as the failure to afford a hearing prior to the initial determination, the lack of advice to Dupree upon what information the Commandant based his determination,

14. *Id.* § 121.21(a)(3)(i), as amended Nov. 3, 1953, 18 Fed. Reg. 6942, Feb. 5, 1954, 19 Fed. Reg. 674. See Note 11, *supra.*

15. 33 C. F. R. § 121.23.

16. *Id.* § 121.25.

17. *Id.* § 121.27, 121.29.

18. *Id.* § 121.31.

the failure to confront Dupree with any witnesses or evidence in support of the Commandant's determination, and, generally, unconstitutional denial to Dupree of property rights through application of the procedure to him.

In seeking damages from the United States under the Federal Tort Claims Act, recovery is not precluded by the fact that the claim involves a uniquely governmental activity. Rayonier v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61 (1955). The fact that there is no counterpart in private law for the governmental activity creates a problem in applying the local tort law as required in 28 U.S.C. § 2674. Proof of negligence in failing to fight a forest fire [19] or in the operation of a lighthouse light [20] involves concepts of local law which may be adapted to such situations without great difficulty. It is in a regulatory situation such as presented in the instant case that the perplexities in ascertainment of the tort in accordance with local law become more apparent. But stripping such situation of its governmental foliage, extraction of the tort where one exists is not an insurmountable difficulty. Whether it be negligence or an intentional tort, the court must characterize the situation in terms the local law will permit.[21] Here Dupree hoped to prove that something was done to him as a result of negligence or an intentional tort, both of which are bases for an action under the Tort Claims Act.[22]

The allegations in Dupree's complaint, however, do not permit the application of any local law in characterizing the alleged tort since the act provides that the actions of government employees acting within a statutory or regulatory

19. Rayonier Inc. v. United States, 352 U. S. 315 (1957).

20. Indian Towing Co. v. United States, 350 U. S. 61 (1955).

21. Cf. Aleutco Corp. v. United States, 244 F.2d 674 (3rd Cir. 1957).

22. 28 U. S. C. § 2680(h) excepts from the act many of the intentional torts. However, certain torts in trespass and a tort sounding in conversion are still proper theories for recovery against the United States. Aleutco Corp. v. United States, *supra*; see Hatahley v. United States, 351 U. S. 173, 181 (1956).

framework are not a basis for a claim even if the statute or regulations be invalid. The first part of 28 U.S.C. § 2680(a) contains this exceptionary clause:

> "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . ."

The above clause is concerned with acts of government employees exercising due care in executing the provisions of a statute or regulations, whether valid or invalid. Dalehite v. United States, 346, U.S. 15, 33 (1953). Where government employees act pursuant to and in furtherance of regulations, resulting harm is not compensable under the act, Powell v. United States, 233 F.2d 851 (10th Cir. 1956); Schmidt v. United States, 198 F.2d 32 (7th Cir.), *cert. denied*, 344 U.S. 896 (1952); Smith v. United States, 101 F. Supp. 87 (D. Colo. 1951), *appeal dismissed*, 196 F.2d 222 (10th Cir. 1952); except where they do not exercise due care, Hatahley v. United States, 351 U.S. 173, 181 (1956).[23]

In an action for declaratory and injunctive relief, the Ninth Circuit ruled the regulations here involved to be invalid. Parker v. Lester, 227 F.2d 708 (1955). However, the Tort Claims Act did not contemplate "that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort."[24] Nor did it contemplate a remedy for damages sustained by reason of the application of invalid laws or

23. In the *Hatahley* case the Secretary of the Interior, pursuant to the Taylor Grazing Act, 48 Stat. 1269 (1934), 43 U. S. C. § 315, promulgated regulations to provide for the most beneficial use of the public range and to protect grazing rights. In enforcing the regulations, government employees did not give the notice required by the regulations prior to destruction of horses belonging to Hatahley and others. This failure to comply with the regulations was not within the meaning of "due care" envisaged by the exception.

24. See H. R. Rep. No. 2245, 77th Cong., 2d Sess. 10; S. Rep. No. 1196, 77th Cong., 2d Sess. 7; H. R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6; Hearings before House Committee on Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. 33.

regulations. Here the alleged insufficiencies in the administrative procedure and its execution were consistent and in accordance with the regulations promulgated by the Commandant of the Coast Guard.[25] There is no allegation of lack of due care in the application of the regulations to Dupree. That being so, Dupree cannot make out a claim based upon the actions of officials enforcing the regulatory scheme. Since his claim is based upon nothing more than the invalidity of the regulations under which his security clearance was processed, it is precisely the type of claim which Congress intended to exclude, and recovery is accordingly barred.

The United States and Dupree in the district court and here argued the question of the applicability of the discretionary function exception. Whether or not that part of the exception in § 2680(a) is applicable to the official representatives enforcing the regulations of the Commandant need not be decided in view of the applicablity of its first part. The discretionary function exception has been a confusing one in meaning and in application.[26] Due to the paucity of facts upon which to determine the extent of discretion exercised by the various officials acting with respect to Dupree, this is not a proper case to test the applicability of that exception.[27] Therefore, as to all those officials, reliance need be placed only on the first part of the exception since there is no indication of proof to be presented that those employees did not exercise due care in carrying out the regulations.

As to the Commandant of the Coast Guard, however, the discretionary function exception is clearly applicable.

25. For a detailed discussion of the prior security clearance procedure, see Brown and Fassett, *Security Tests for Maritime Workers*, 62 Yale L. J. 1163, 1172-1179 (1953). New regulations were promulgated by the Commandant on May 1, 1956, 29 Fed. Reg. 2814, 33 C. F. R. (1956 Supp.) Part 121.

26. Note, 66 Harv. L. Rev. 488 (1953).

27. Unlike Dalehite v. United States, 346 U. S. 15, (1953), where the Supreme Court had the benefit of evidence as to the duties of the various government employees involved.

Whether the claim be based upon the wrongful denial of a security clearance or upon the promulgation of unreasonable and unconstitutional regulations, it is barred.

The duty of determining whether a security clearance should be given or denied was vested in the Commandant by the Executive Order.[28] This determination by the Commandant was the product of an exercise of judgment, an action involving discretion within the meaning of the exception.[29] Furthermore, the conduct of the administrative process which provided the basis for the Commandant's determination was the result of procedures judged by the Commandant to be best fitted for the purpose. The segment of the Commandant's judgment was also within the meaning of the discretionary function exception. Little more need be said about this phase of Dupree's claim since it is apparent that it was not the intention of Congress to encompass it within the periphery of the Tort Claims Act.[30]

Dupree has also urged the Fifth Amendment of the Constitution as grounds for recovery from the United States. However, claims for the amount involved, against the United States based upon the Constitution are within the jurisdiction of the Court of Claims which has already ruled on the validity of Dupree's constitutional theory.[31]

For the reasons stated the judgment of the district court will be affirmed.

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28. Note 8 *supra*.

29. Dalehite v. United States, *supra* at page 34.

30. See Hearings before House Committee on Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. 33. Analogous situations existed in Dalehite v. United States, *supra* (cabinet-level decision to institute a fertilizer export program; failure of the Coast Guard and other agencies to regulate the storage or loading of the fertilizer in a different fashion from that used); Schmidt v. United States, 198 F. 2d 32 (7th Cir.), *cert. denied*, 344 U. S. 896 (1952) (decision by the Securities and Exchange Commission to investigate and publish information concerning a corporation); Matveychuk v. United States, 195 F. 2d 613 (2d Cir.), *cert. denied*, 344 U. S. 845 (1952) (Office of Price Administration denial of rent increase).

31. 28 U. S. C. § 1491. See Note 4 *supra*.

OPINION OF U. S. DISTRICT COURT

(In previous case.)

LORD, *J.* November 5, 1956

This matter comes before the Court on Defendant's Motion to Dismiss. The Government contends that the complaint fails to state a cause of action with respect to which the United States has consented to be sued in accordance with the Federal Tort Claims Act, Title 28 U.S.C.A. §§ 1346(b) and 2680(a).

Plaintiff alleges that in 1930 the United States Coast Guard issued to him a five year master's license, which certified his fitness to be a master of merchant vessels of unlimited tonnage. The license was reissued each five years thereafter. In September, 1950 plaintiff sought from the Coast Guard a validated certificate which was then required as a prerequisite for an officer or seaman to sail on a ship of United States registry. Such certificate was required by the Act of September 26, 1950 (64 Stat. 427, 1038, Title 50 U.S.C.A. § 191) and Executive Order 10173 (15 Fed. Reg. 7005).

On May 23, 1951, plaintiff was advised that he was denied the validated certificate on security grounds. In November of 1955, the Coast Guard reversed its prior position and determined that plaintiff was eligible for employment.

Thereafter, the plaintiff commenced an action in the United States Court of Claims for reimbursement of wages lost and other damages which he allegedly suffered during the period that the Coast Guard withheld certification.

The Court of Claims granted the Government's motion to dismiss plaintiff's action. (See Eugene Dupree v. The United States, 24 L. W. 2569). Following this dismissal, suit was instituted in this Court.

Plaintiff contends that the refusal of the Coast Guard to certify him was a negligent act and thus is a suit that is cognizant under the Federal Tort Claims Act, supra.

Plaintiff was denied certification as authorized by the Act of September 26, 1950, supra, which was passed by Congress during the Korean crisis. The Act authorized the President, in a time of national emergency, to make rules and regulations governing the movement and anchorage of vessels in the territoral waters of the United States. The primary purpose was "in order to secure such vessels from damage or injury; to any harbor or waters of the United States", and in pursuance of this purpose when necessary, "to take full possession and control of such vessel and remove therefrom the officers and crew thereof . . ."

Pursuant to the authority of this Act, the President issued Executive Order 10173, which required that each seaman secure a certificate that his employment on a merchant vessel was consistent with the purpose sought to be accomplished by the Act. This order vested enforcement of the Act in the Commandant of the Coast Guard.

The Federal Tort Claims Act, supra, provides when actions can be brought against the United States as follows:

"§ 1346. United States as defendant

(b) . . . exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The defendant contends it has specifically withheld its consent to be sued under the following exceptions to the Act:

"§ 2680. Exceptions

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The defendant cites the case of *Dalehite v. United States*, 346 U. S. 15 (1953) as controlling in this action. There, Mr. Justice Reed speaking for the majority construed § 2680 and said at page 32:

"One only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions. Negligence in administering the Alien Property Act, or in establishing a quarantine, assault, libel, fiscal operations, etc., was barred. An analysis of § 2680 (a), the exception with which we are concerned, emphasizes the congressional purpose to except the acts here charged as negligence from the authorization to sue. It will be noted from the form of the section, see p. 18, supra, that there are two phrases describing the excepted acts of government employees. The first deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. It bars tests by tort action of the legality of statutes and regulations. The second is applicable in this case. *It excepts acts of discretion in the performance of governmental functions* or duty 'whether or not the discretion involved be abused . . .'" (Emphasis supplied.)

The plaintiff relies upon *Indian Towing Co. v. United States*, 350 U. S. 61 (1956) in support of his contentions. However, this Court is of the opinion that the latter case

has no application to the instant case. In the *Indian Towing* case, the plaintiff sued for damages caused by a shipwreck resulting from the failure of the Coast Guard to maintain a channel light. The Court at page 64 said:

> "The question is one of liability for negligence at what this Court has characterized the 'operational level' of governmental activity. *Dalehite v. United States*, 346 U. S. 15, 42. The Government concedes that the exception of § 2680 relieving from liability for negligent 'exercise of judgment' (which is the way the Government paraphrases a 'discretionary function' in § 2680 (a)) is not involved here, . . ."

In the instant case, the Coast Guard followed the procedure under the regulations adopted pursuant to the Statute. The Commandant was authorized to exercise his judgment in refusing to issue the certificate to the plaintiff. Such decisions cannot be considered as negligent regardless of the final result of his conclusions.

Therefore, this Court is of the opinion that the Commandant of the Coast Guard was performing a "discretionary function or duty" with respect to the plaintiff. The defendant is not liable for negligence since the act performed cannot be characterized as on the "operational level" of governmental activity.

Accordingly, Defendant's Motion to Dismiss is hereby GRANTED.

/s/ JOHN W. LORD, JR.,
J.

MOTION TO DISMISS.

(In previous case.)

Defendant moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a cause of action against defendant upon which relief can be granted.

2. To dismiss the action because the Complaint fails to state a cause of action against the defendant, the United States, with respect to which the United States has consented to be sued, as set forth in Title 28 U. S. C., Section 2680(a) and (b).

3. To dismiss the action for the reason that the Court lacks jurisdiction of the subject matter.

/s/ W. WILSON WHITE,
W. Wilson White,
United States Attorney.

/s/ NORMAN C. HENSS,
Norman C. Henss,
Assistant United States Attorney.

COMPLAINT IN TRESPASS.

(In previous case.)

AND NOW comes Eugene Dupree and presents this claim upon the following representations:

1. Eugene Dupree is a citizen of the United States residing at 125 South 21st Street, Philadelphia, Penna., and during the period from 1930 through 1956 he was a licensed ship's master for vessels of unlimited tonnage and was so licensed by the United States Coast Guard by virtue of the authority and responsibility granted it by R. S. 4439, December 21, 1898, C. 29, Section 2, 30 Stat. 764 (46 U. S. C. A. 226).

2. This action sounds in tort and is brought under Section 1346(b) Title 28 United States Code.

3. That during September, 1950, the plaintiff applied for a berth as a ship's master.

4. Upon receipt of that application, the United States Coast Guard refused to certify plaintiff available for such a berth, or for any other berth in the merchant marine.

5. On May 23, 1951, the United States Coast Guard advised the plaintiff that it had not and would not certify plaintiff available for employment in the merchant marine because the Commandant of the Coast Guard had determined, without affording plaintiff a hearing, that there was reason to believe that plaintiff had been affiliated with or was sympathetic with an organization, association, group or combination of persons subversive or disloyal to the Government of the United States.

6. On May 23, 1951, plaintiff was also advised that he might request a hearing at which he could offer evidence to establish that he was not affiliated with or was not sympathetic with any organization, association, group or

combination of persons subversive or disloyal to the Government of the United States.

7. Plaintiff requested and was given such a hearing but neither prior to nor at said hearing was he advised upon what the Commandant based his aforementioned determination.

8. Neither at that hearing nor at appeal hearings thereafter was plaintiff confronted with any witnesses or evidence in support of the Government's charge or determination that the plaintiff was affiliated with or was sympathetic with an organization, association, group or combination of persons subversive or disloyal to the United States, despite his repeated denials of said charges.

9. Nevertheless from September 1950 to November 1955, the Government denied the plaintiff the opportunity to accept employment or to otherwise engage in activities as a ship's master.

10. The plaintiff throughout this said period alleged the unilateral procedure by which the Government determined he was denied the opportunity to act as a ship's master was an illegal and unconstitutional denial to him of his property and property rights as a licensee and as a skilled and trained ship's master.

11. Without explanation and without disclosure upon what evidence or upon what witnesses the Government had relied during the said period from September 1950 to November 1955, the Government thereafter reversed its former determination that the plaintiff was affiliated with or was sympathetic with an organization, association, group or combination of persons subversive or disloyal to the United States and in so reversing permitted the plaintiff to thereafter engage in activities as a ship's master.

12. Because of the aforementioned denial, plaintiff has suffered loss of earnings and other rights and benefits.

which he would have earned, made or received, and plaintiff has incurred other losses and expenses including but not limited to legal and other expenses incurred in reversing and vacating the aforementioned Government denial and plaintiff has suffered and incurred an incurable physical disability as a result of the nervous strain and tension he underwent during the period in which the aforementioned Government denial was effective and during which plaintiff sought to have that aforementioned denial reversed and vacated, and the plaintiff has suffered humiliation, disgrace and consequent pain and suffering as a result of having been determined by the United States as either subversive or disloyal to the United States or sympathetic with or affiliated with persons or groups who were subversive to or disloyal to the United States.

WHEREFORE, plaintiff brings this action for the sum of $100,000.

/s/ WILLIAM J. WOOLSTON,
William J. Woolston,
2015 Land Title Bldg.,
Philadelphia 10, Pa.
Attorney for Plaintiff.